87-5546

No. ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 823 F.2d 98 (5th Cir. 1987). A copy of the opinion is attached as Appendix A.

The memorandum decision of the United States District Court for the Western District of Texas has not been reported. It is attached as Appendix B.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 2254 and 28 U.S.C. § 1331, petitioner filed a petition for writ of habeas corpus by a person in state custody in the Western District of

Texas, after exhausting his remedies in the state courts. On April 11, 1986, the district court stayed petitioner's sentence of death. On July 9, 1986, following an evidentiary hearing, the court denied the petition for writ of habeas corpus and vacated the stay of execution. The court also denied petitioner's application for certificate of probable cause to authorize appeal, but granted his application to proceed in forma pauperis.

On appeal to the Fifth Circuit Court of Appeals, petitioner filed an application for stay of execution, and an application for certificate of probable cause to authorize appeal and for leave to proceed on appeal in forma pauperis. On September 12, 1986, these applications were granted by the Fifth Circuit. On July 30, 1987, the judgment of the district court was affirmed and the stay of execution was vacated. No petition for rehearing was sought.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth, Fifth, Sixth, Eighth and Fourteen Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted of capital murder and assessed the death penalty pursuant to TEX. PENAL CODE ANN. § 19.03(a)(2). In this petition he lists and discusses seven separate reasons for granting this writ. For the sake of clarity, the facts in this statement of the case will be set out separately, corresponding with each separate reason for granting the writ.

I.

(Impermissible Comment on Post Arrest Silence, in Violation of Doyle v. Ohio)

At trial the state asked its police officer witness whether he had "a conversation" with petitioner at the homicide office, following the arrest and the administration of the Miranda warnings. This detective, a veteran of 24 years as a police officer, testified: "I talked to him but he refused to talk to me." [R.X--2279][1] Petitioner's proper objection was sustained, and the jury was instructed to disregard. His motion for mistrial, however, was overruled. [R.X--2279-2280]

The Court of Appeals below found this to be "the most nearly meritorious" of petitioner's grounds of error. Nevertheless, the court ruled against petitioner, holding that no use of petitioner's silence had been permitted by the trial court, and thus, under this Court's decision in Greer v. Miller, ____U.S. ____, 107 S.Ct. 3102, 95 L.Ed.2d_____ (1987), no error was shown. Franklin v. Lynaugh, 823 F.2d 98, 99 (5th Cir. 1987).

II.

(Illegal Search and Seizure)

Sometime after 2:00 a.m. on July 26, 1975 petitioner became a suspect in the abduction of Mary Margaret Moran. [R.II--86,218] A large group of police officers held a meeting in the vicinity of petitioner's home because they "didn't know what [they] were going to do about the situation." [R.II--218] A "conscious

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1. References are to the volume and page number of the transcribed record of petitioner's trial, unless otherwise noted.

decision" was made at this time not to seek either an arrest or search warrant. [R.II--159-160] Instead the police agreed to "try to use a consent to search," and the appropriate forms were filled out. [R.II--219] This meeting was held at approximately 5:00 a.m., some three hours after petitioner's identity was known. [R.II--148]

The police established a quadrant around petitioner's house, covering all possible doorways and exits to prevent escape. [R.II--189--190] Several armed police officers went to the back door, and called out for petitioner, who eventually came to the door. [R.II--189] Petitioner was not free to go from the moment he came to the door. [R.II--170] He was advised he was a suspect and given his Miranda warnings immediately. [R.II--153]

The visit was at 5:00 a.m. and it had awakened petitioner. [R.II--122] The police jerked petitioner out of the house, and thrust a clip board to his stomach, insisting that he sign it. [R.II--91, 92, 112-113]

Most of the police officers denied that they personally drew their guns, and were unable to recall seeing their colleagues with drawn guns. [R.II--155; 183; 223; 261] One officer, detective Rudy Buenrostro, however, testified that he had his gun drawn during the arrest, until he holstered it to read petitioner his "rights." [[MTS--468] Buenrostro's testimony on this point was unequivocal: "I know I had mine drawn." [MTS--468][emphasis supplied]. Buenrostro also testified that "between five and ten minutes passed between his arrival and the time he read

[petitioner] his rights." [MTS--424]

Detective Robert Urban testified that petitioner was not coerced in anyway, and that his gun was not drawn. [R.II--223, 242] He admitted telling petitioner:

> If you got nothing to hide go ahead and sign this, if you don't sign it then I will have to go and get a search warrant.

[R.II--244][emphasis supplied]. And:

> And also explained to him if he didn't sign it, we would go and get a search warrant.

[R.II--224][emphasis supplied]. And:

> I told him, if he refused to sign, I told him he could refuse to sign, if he refused to sign, I'm going to get a search warrant.

[R.II--236][emphasis supplied].

Petitioner did sign the consent to search [R.X--2275] and the police searched his home, his yard and a 1959 green Buick.

A large amount of evidence was seized which tended to link him to circumstantially to the abduction and assault of Ms. Moran. Unquestionably, without this evidence, there would have been no support for the conviction in this case.

The trial court overruled petitioner's motion to suppress and this evidence was admitted at trial. [R.II--285] The suppression issue was not raised again on direct appeal, and was therefore not considered by the Texas Court of Criminal Appeals.

The district court refused to consider the search and seizure claim under Stone v. Powell, 478 U.S. 465 (1976). The court rejected petitioner's argument that Stone's rule of preclusion is not applicable because appellate counsel was

ineffective in not raising the suppression on direct appeal. Franklin v. McCotter, No. SA-86-CA-608 (W.D. Tex. July 9, 1986). The Court of Appeals did not discuss this issue in its opinion.

III.

(Failure to Instruct the Jury on Mitigating Evidence)

Petitioner submitted five special requested jury charges seeking instruction regarding consideration of mitigating evidence at the punishment phase of this capital murder prosecution. [R.I--47-51] These requested instructions were refused and the jury was not instructed in any manner whatsoever concerning mitigation. [R.I--53-54] The district court held that the trial court did not err in failing to so instruct the jury. Franklin v. McCotter, supra, slip op. 2. The Court of Appeals did not discuss this ground of error.

IV.

(Appellate Counsel Rendered Ineffective Assistance)

Petitioner contended his appellate counsel was ineffective because he failed to raise both the suppression issue [See "II" above] and the trial court's failure to instruct on mitigating evidence. [See "III" above] The district court rejected this ground of error. Franklin v. McCotter, supra, slip op. 11. The Court of Appeals did not discuss it.

V.

(Improper Exclusion of Venireperson Santana)

Venireperson Flavia Santana stated that, due to the seriousness of the case, she would "want to be more than

reasonably convinced;" that her deliberations would be more careful; that her personal assessment of what a reasonable doubt was would be stricter; and, that her "level . . . for reasonable doubt is very high," and that that limit "is very close to one hundred percent." [R. V--1189-1196]

Based on these responses, the state's challenge for cause was granted, over petitioner's objection. [R.V--19985-96]

The district court rejected this ground of error based on the magistrate's recommendation. Franklin v. McCotter, supra, slip op. 1. The Court of Appeals did not discuss the issue.

VI.

(Special Issue Number One is Meaningless)

Two special issues were submitted to the jury at punishment as required by TEX. CODE CRIM. PROC. ANN. art. 37.071(b). The first special issue asks:

> whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(1). When both special issues were answered affirmatively by the jury the trial court sentenced petitioner to death, as required by Texas law. TEX. CODE CRIM. PROC. ANN. art. 37.071(e). No. mitigating instructions were given. Petitioner complained of this in his petition for writ of habeas corpus. Based on the findings of the magistrate, the district court rejected this point. Franklin v. McCotter, slip op. 1. No mention of this issue was made by the

Court of Appeals.

VII.

(Submission of Two Separate Offenses in a Single Paragraph of the Jury Charge)

The first paragraph of the indictment alleged capital murder in the course of committing and attempting to commit kidnapping. The second paragraph alleged capital murder in the course of committing and attempting to commit robbery. [R.I--2] The trial court overruled petitioner's motion to require the state to elect, [R.XII--2737] and both paragraphs were submitted to the jury. In fact, both paragraphs were submitted to the jury in a single application paragraph, number nine, which authorized conviction upon a finding of murder "in the course of committing and attempting to commit the offense of robber or kidnapping." [R.I--31][emphasis supplied] The jury returned a general verdict of "guilty of capital murder." [R.I--38]

The Court of Appeals was initially "concerned" about this contention, but resolved it by looking at the trial record. Since there was ample evidence of both a kidnapping and a robbery, the court found that this issue "lacks any substance whatever, despite its abstract plausibility." Franklin v. Lynaugh, supra, 823 F.2d at 98.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE STATE DID NOT USE PETITIONER'S POST ARREST SILENCE AGAINST HIM, IN VIOLATION OF DOYLE V. OHIO.

Both the Texas Court of Criminal Appeals and the United States District Court below agreed that detective Urban's statement. "I talked to him but he refused to talk to me," constituted an impermissible comment on petitioner's exercise of his right to remain silent. E.g., Franklin v. State, 693 S.W.2d 420, 428 (Tex. Crim. App. 1985). Clearly, under the Fifth and Fourteenth Amendments of the United States Constitution, it did. E.g., Doyle v. Ohio, 426 U.S. 610, 618 (1976); United States v. Luna, 539 F.2d 417, 417 (5th Cir. 1976); United States v. Harp, 536 F.2d 601, 603 (5th Cir. 1976). Both courts, however, went on to hold that this error was harmless. E.g., Franklin v. State, supra, 693 S.W.2d at 428-429.

The Court of Appeals took a different approach. Noting that this was a single reference, followed by a sustained objection and an instruction to disregard, the Court held that, under Greer v. Miller, supra, the trial court had not permitted the use of petitioner's silence against him. Franklin v. Lynaugh, supra, 823 F.2d at 99. Petitioner respectfully disagrees.

In Greer, this Court held that Doyle is not violated where post arrest silence is not used. Greer, however, is distinguishable on its facts. There, unlike here, there was no completed Doyle violation. Rather, there was only an attempted violation. Greer v. Miller, supra, 107 S. Ct. at 3109. The prosecutor attempted to violate Doyle by asking, "Why didn't you tell this story to anybody when you got arrested?" Id. at 3105. Before the question could be answered, the trial court sustained

defense counsel's objection, and instructed the jury to disregard the question. Id.

> The fact of Miller's postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference, and thus no Doyle violation occurred in this case.

Id. at 3108.

In the present case, in contrast, petitioner's post arrest silence was submitted to the jury when detective Urban testified "I tried to talk to him but he refused to talk to me." That is, there was more than simple an unanswered question by the prosecutor. Accordingly, unlike in Greer, it cannot fairly be said here that post arrest silence was not used. The Court of Appeals erred when it held that: "Greer is on all fours; it controls." Franklin v. Lynaugh, supra, 823 F.2d at 99.

Instead the proper question, and a question not reached in Greer, is whether or not this Doyle error was harmless. The proper standard of review is found in Chapman v. California, 386 U.S. 18 (1967).

In Chapman this Court held that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." Id. at 22.

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

Id. at 23. The burden is on the state, when it seeks to invoke

the harmless error rule, to "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24.

Chapman mandates examination of the "setting of a particular case," and indeed, it is the setting of this case which makes it clear that the Doyle violation here was not harmless. Any capital murder case necessarily is possessed of horrible facts. See Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980). The facts here are notably horrible, however, and the single most notable fact is that the victim was left for dead in an open field and had to endure exposure for five days in the July sun, slowly bleeding to death from seven stab wounds, infested with insects. This fact was not lost on the prosecution which took every opportunity to remind the jury. [R.IX--2035-36; XIII--2875; 2882-83; XIV--2979] Based on these facts the state could persuasively assert that this was "one of the most sensational . . . cases in Bexar County history." [R.XIII--2902] Considering the context, the inflammatory impact of the question and response are unmistakable. Petitioner, who was arrested and questioned within hours of the abduction, and who was the one person according to the state who could have prevented the suffering and indeed the death of Ms. Moran, chose instead to remain silent. It is difficult to believe that the jury, which convicted petitioner and sentenced him to die, did not consider the fact that his silence was itself the cause of this tragedy. In light of the peculiar relationship between petitioner's silence and the

terrible facts adduced, it is wrong to call this violation harmless.

The Court of Appeals erred in applying the rule of law of Greer v. Miller to the facts in the present case because here, unlike Greer, petitioner's post arrest silence was used against him. Considering the facts of this case, it cannot be said that this error was rendered harmless, either because it was a single reference, or because the jury was promptly instructed to disregard. Certiorari should be granted in this case because the Court of Appeals' opinion below conflicts with Doyle v. Ohio.

II.

THE LOWER COURTS ERRED IN REFUSING TO CONSIDER THE SUPPRESSION ISSUE UNDER STONE V. POWELL.

In Stone v. Powell, 428 U.S. 465 (1976) the Court held that "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Id. at 494. Here petitioner, through no fault of his own, was not afforded any opportunity whatsoever to have the state appellate court resolve his Fourth Amendment question. As pointed out in ground of error four, infra, appointed counsel on direct appeal did not raise this question and it was therefore not considered by the Texas Court of Criminal Appeals. In light of counsel's ineffective assistance on appeal, it cannot be said that petitioner was afforded Stone's

opportunity for full and fair litigation of his Fourth Amendment claim.

Despite the fact that counsel on direct appeal did not raise the suppression issue, the lower courts held that Stone bars review both because petitioner litigated the issue at the trial level, and because the "opportunity for full and fair litigation," required by Stone, means only that the state courts must provide a procedural vehicle for litigating Fourth Amendment claims. Both case law and logic plainly oppose these conclusions.

Initially, petitioner notes that the holding below conflicts with Stone v. Powell itself. In Stone, unlike the present case, petitioners had actually litigated their Fourth Amendment claims on direct appeal in state court. Id. at 470, 472. And the language used in Stone must be examined carefully. Justice Powell framed the question there to be whether petitioners, who had already been given opportunity for consideration by the state courts, "may invoke their claim again on federal habeas corpus review." Id. at 489 (emphasis supplied) Obviously to invoke one's right again, one must have actually invoked it before. Dunn v. Rose, 504 F. Supp. 1333, 1336 (M.D. Tenn. 1981).

Additionally, the holding below conflicts with numerous holdings from the Fifth Circuit Court of Appeals. Scott v. Maggio, 698 F.2d 916 (5th Cir. 1983) is the case most clearly on point.

In Scott, the defendant had raised his Fourth Amendment

claim, not on direct appeal, but by way of petitions for mandamus and prohibition, which were refused by the Louisiana Supreme Court in an unpublished order. Id. at 918. After collateral relief was denied in state court, defendant took his Fourth Amendment claim to federal court by way of 28 U.S.C. § 2254. In determining whether Stone barred review, the Fifth Circuit observed that there was nothing in the opinions or orders by the Louisiana Supreme Court to affirmatively indicate that Scott's Fourth Amendment claims had actually been considered by that court. Consequently, that court may have "failed to consider fully the multiple claims of a habeas petitioner." Id. at 919. Acknowledging Stone's general rule of preclusion, the Fifth Circuit nonetheless went on to decide the Fourth Amendment issues:

> But since these were not discussed, it can fairly be argued that Scott has not been presented with the full and fair opportunity of which Stone v. Powell speaks. In light of this, we assume, without deciding, that we are empowered by Stone v. Powell to pass on the merits of the Fourth Amendment claims raised by Scott's habeas petition.

Id. at 920 (emphasis supplied) Thus despite Stone v. Powell, the Court considered, and rejected on the merits, Scott's Fourth Amendment claims. Id.

In the present case, just as in Scott, the appellate court in Texas has not yet written a single word on petitioner's Fourth Amendment claim, nor has it otherwise indicated in any way that it has considered same. Indeed, the present case presents even stronger facts than Scott v. Maggio, because here, unlike in

Scott, petitioner's claims were never even presented to the Texas Court of Criminal Appeals prior to collateral review, due to the ineffectiveness of appellate counsel. Therefore, "it can fairly be argued that [petitioner] has not been presented with the full and fair opportunity of which Stone v. Powell speaks." Id.

The following cases are additional support for petitioner's contention that Stone v. Powell does not bar consideration of his Fourth Amendment issue: Smith v. Wainwright, 581 F.2d 1149, 1151 (5th Cir. 1978)(indication that Fourth Amendment issue was considered on appeal places this case "squarely into the interdiction of Stone"); Gibson v. Jackson, 578 F.2d 1045, 1053 (5th Cir. 1978)(discussing conclusive effect of Stone where defendant is unrepresented by counsel); Tackno v. Blackburn, 571 F.2d 1383, 1384 (5th Cir. 1978)(no error in failing to review search issue where the issue was actually considered on direct appeal, despite late filing of brief); Sosa v. United States, 550 F.2d 244, 249 (5th Cir. 1977)(opportunity "must include . . . one decision by an appellate court)(emphasis supplied); O'Berry v. Wainwright, 546 F.2d 1204, 1213 (5th Cir. 1977)("the full and fair consideration requirement satisfied where the state appellate court . . . gives full consideration to defendant's Fourth Amendment claims").

Common sense compels the conclusion that Stone's "opportunity for full and fair litigation" means more just than that the state must have a procedural device for pursuing Fourth Amendment claims. Since every state must presumably have such a

device in order to effectuate the mandate of Mapp v. Ohio, 367 U.S. 643 (1961), Stone v. Powell's "opportunity" would be meaningless if this is all that was required. Surely the Supreme Court of the United States did not intend a useless thing. See Dunn v. Rose, 504 F. Supp. 1333, 1336 (M.D. Tenn. 1981). In the present case, of course, in light of his counsel's ineffectiveness, petitioner had no opportunity whatsoever for appellate review, much less meaningful appellate review. In Gibson v. Jackson, 578 F.2d 1045, 1053 (5th Cir. 1978) Judge Rubin wrote that Stone v. Powell did not bar relief there where defendant had been unrepresented by counsel, since Stone provides for conclusive effect only if the petitioner has been afforded "an opportunity for full and fair litigation of (his) Fourth Amendment claim." Id. If Stone is inapplicable where petitioner is unrepresented, it surely can not apply where his court appointed counsel ineffectively elects not to present the issue on appeal, hence leaving his client unrepresented as to this issue.

The requirement of appellate review is heightened in this capital case. Under TEX. CODE CRIM. PROC. ANN. art. 37.071(h) the judgment of conviction in this case was subject to automatic review by the Texas Court of Criminal appeals. This requirement of prompt appellate review was cited in Jurek v. Texas, 428 U.S. 262 (1976) as a "means to promote the evenhanded, rational, and consistent imposition of death sentences under law." Id. at 276. It would be untenable for this Court to sustain the decision

below that Stone does not require appellate review, in light of the Jurek's holding that prompt appellate review is one of the safeguards insuring the constitutionality of the Texas capital punishment scheme.

The lower courts erroneously failed to consider petitioner's meritorious suppression issue. This error stemmed from a misinterpretation of this Court's decision in Stone v. Powell. This writ should be granted so that this Court can determine whether the doctrine of Stone v. Powell can be applied to preclude consideration of a Fourth Amendment claim where that claim was not raised on direct appeal due to the ineffectiveness of counsel.

III.

THE FIFTH CIRCUIT ERRED IN HOLDING THAT MITIGATING INSTRUCTIONS NEED NOT BE GIVEN OUT THE PUNISHMENT PHASE OF A CAPITAL MURDER PROSECUTION

The lower courts relied on Jurek v. Texas, 428 U.S. 262 (1976); Zant v. Stephens, 462 U.S. 862 (1983); and Esquivel v. McCotter, 777 F.2d 956 (5th Cir. 1985). In fact none of these cases compel the conclusion reached by the Fifth Circuit.

Jurek found that the Texas capital punishment scheme permitted consideration of mitigating circumstances, as the constitution requires. Petitioner's complaint is that this is a hollow privilege indeed if the jury is given no guidance whatsoever as to these circumstances. Indeed, it is anomalous for courts on the one hand to say that mitigating evidence may not constitutionally be limited, and, on the other hand, that

such evidence may be admitted without any guidance whatsoever to the jury. This is especially inexplicable in death penalty cases, where the Supreme Court has demanded that sentencing discretion be narrowed to insure that only the deserving suffer the ultimate punishment. E.g., Furman v. Georgia, 408 U.S. 238 (1972).

Zant v. Stephens does not require a different result. In Zant, the jury was expressly authorized by the trial court "to consider all the evidence received during the trial as well as all facts and circumstances presented in extenuation, mitigation or aggravation during the sentence proceeding." Zant v. Stephens, supra, 462 U.S. at 866. [emphasis supplied] In the present case, the jury charge did not mention mitigation or extenuation.

Nor does Esquivel v. McCotter support the holding of the court. There, at least, the jury was charged on, and considered, "the mitigating self defense factors" contained in TEX. CODE CRIM. PROC. ANN. art. 37.071 (b)(3). No such instruction was given here. [R.I--53-54]

Three members of the Texas Court of Criminal Appeals have noted the following:

> If we are insure the constitutionality of 37.071, we must not only give lip service to broadly interpretating it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know

> the holdings of Lockett and Eddings until the defendant affirmatively proves the contrary.

Stewart v. State, 686 S.W.2d 118, 125-26 (Tex. Crim. App. 1984)(Clinton, J. joined by Teague and Miller, J.J., dissenting); See also Johnson v. State, 691 S.W.2d 6129, 27 (Tex. Crim. App. 1984)(Clinton, joined by Miller, J., dissenting). This is precisely petitioner's contention. This Court has not yet addressed the question whether mitigating instructions are required under the Texas capital scheme. This writ should be granted so that this question can be resolved.

IV.

THE FIFTH CIRCUIT ERRED IN NOT FINDING APPELLATE COUNSEL INEFFECTIVE

Petitioner asserts that appellate counsel was ineffective for failing to raise two meritorious issues on appeal--the failure to charge the jury on consideration of mitigating evidence, and the denial of the motion to suppress.

As to the jury charge issue, the lower courts disagreed with petitioner, holding that, since the trial court had not erred in overruling these charges, appellate counsel was not ineffective for not raising this issue on appeal. Petitioner has demonstrated in ground "III", above, however, that the trial court did err in failing to charge the jury consideration of mitigating evidence. Since this was in fact error which would have resulted in reversal, appellate counsel was ineffective for not presenting it to the Texas Court of Criminal Appeals.

As to the suppression issue, the district court below

determined that counsel's performance was neither deficient, nor was petitioner prejudiced, and that therefore, reversal was not required under Strickland v. Washington, 465 U.S. 668 (1984). Petitioner submits that a correct analysis of the facts of this case revels that both prongs of Strickland--deficiency and prejudice--were, in fact, met, and that the courts below erred in holding otherwise.

As to the deficient performance, the court accepted counsel's testimony. According to counsel he evaluated the suppression issue and determined that it lacked merit. Therefore, so as not to diminish his credibility and detract from other points he believed more meritorious, he chose not to brief the suppression issue. The court found that this decision represents the kind of strategy that able counsel pursue and appellate courts appreciate and was not deficient.

The flaw in this reasoning is its uncritical reliance on counsel's purported evaluation of the issue. As petitioner will demonstrate below in connection with his discussion on prejudice, the issue was more than arguable, it was meritorious. That is, had it been properly presented on appeal, petitioner's conviction would have been reversed and remanded for a new trial. And, counsel's assertion that the 12 issues he actually presented were so much more meritorious than the omitted suppression issue, is obviously erroneous. Three of the grounds actually raised had previously been clearly rejected by the Texas Court of Criminal Appeals, and five more were acknowledged by counsel himself to be

unprecedented or contrary to existing precedent. Although no attorney can be faulted for presenting issues on appeal that do not ultimately succeed, it is important here that eight of the twelve issues presented by counsel had almost no hope of success. This demonstrates the fallacy of counsel's testimony that the "twelve . . . grounds of error . . . had a significantly greater chance of success" than did the suppression and jury instruction issues. [S.F.II--23][2] In fact, by any rational standard, just the opposite is true.

Gray v. Green, 778 F.2d 350 (7th Cir. 1985) is instructive. There the Seventh Circuit held that Strickland requires the district court to

> examine the trial record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Significant issues which could have been raised should then be compared to those which were raised. Generally, only when ignored issues are clearly stronger than those prosecuted, will the presumption of effective assistance of counsel be overcome.

Id. at 352. Here, the suppression and jury instruction issues were clearly stronger than the majority of issues actually raised by appellate counsel. Counsel was wrong in concluding otherwise, and his performance was deficient as a result.

The court below held that in order to meet Strickland's prejudice prong, petitioner would have to establish a meritorious Fourth Amendment claim resulting in suppression of the

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2. This testimony was given at the evidentiary hearing conducted in the district court on the question of counsel's ineffectiveness.

incriminating evidence. This is, in fact, a higher standard than imposed by this Court. The Strickland opinion expressly states that the accused need not prove that counsel's deficiency was "outcome-determinative," but instead, merely a "probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, 104 S.Ct. at 2068. See Nealy v. Cabana, 764 F.2d 1173, 1180 (5th Cir. 1985)("Even though . . . errors cannot be shown by a preponderance of the evidence to have determined the outcome of Nealy's trial, they were of sufficient gravity to undermine the fundamental fairness of the proceeding").

Even assuming, however, that petitioner was required to prove that appellate counsel's performance was outcome determinative, he has done so here. The issues not raised would have been outcome-determinative, in that they were meritorious and, had they been presented on appeal, they would have resulted in reversal. Petitioner has already discussed the merits of the jury instruction issue in ground "III", supra. A brief discussion of the facts is now necessary regarding the suppression issue.

Evidence of petitioner's guilt was circumstantial. [R.I--33] Almost all the incriminating evidence against petitioner was derived from the arrest of petitioner and the search of his automobile and home. Had this evidence been suppressed, the remaining evidence would have been insufficient to support a conviction for capital murder.

The police had neither an arrest warrant for petitioner nor a search warrant for his home or car. Instead, the validity of the search and seizures conducted here depend entirely on the validity of the consent purportedly given by petitioner. Examination of the facts reveals that this so-called "consent" was invalid for at least three reasons.

First, detective Urban testified that he told petitioner he would get a warrant if petitioner refused to consent. This testimony was positive, unequivocal, uncontradicted, and can be found in at least three places in the record. [R.II--224, 236, 244] Considering this testimony, Hudson v. State, 662 S.W.2d 957 (Tex. Crim. App. 1984), is precisely in point. There the Texas Court of Criminal Appeals noted that "this Court has determined a consent to be involuntary where an officer promised to obtain a search warrant if the subject did not consent to the search." Id. at 958 n.1. Although Hudson was decided in 1984, after counsel filed his brief, it relied on and cited a 1972 case--Paprskar v. State, 484 S.W.2d 731 (Tex. Crim. App. 1972)--for this very proposition. Additionally, the very recent case of Daniels v. State, _____ S.W._____2d, No._____, (Tex. Crim. App. delivered April 9, 1986) explicitly states that the very position urged by petitioner herein is "at least arguable." Id. at slip op. 10.

In light of this case law, it is clear that petitioner's "consent" to search was not voluntary, that is, that there was no consent at all.

Second, although other officers denied having their guns drawn or seeing colleagues with drawn guns, detective Buenrostro positively testified that his own gun was drawn at the time petitioner was arrested. [S.F.I.--468] Consent was obtained at gunpoint and this is no consent at all. E.g., Paprskar v. State, 484 S.W.2d 731, 738 (Tex. Crim. App. 1972); accord, Clemens v. State, 605 S.W.2d 567, 571 (Tex. Crim. App. 1980); Lowery v. State, 499 S.W.2d 260, 167-68 (Tex. Crim. App. 1973).

Third, "consent" was tainted by the preceding warrantless, and, therefore, illegal arrest. E.g., Meeks v. State, 692 S.W.2d 504, 510 (Tex. Crim. App. 1985); Gonzalez v. State, 588 S.W.2d 355, 361 (Tex. Crim. App. 1979); Luera v. State, 561 S.W.2d 497, 498 (Tex. Crim. App. 1978); Truitt v. State, 505 S.W.2d 594, 598 (Tex. Crim. App. 1977).

Because the "consent" was invalid, so were the resultant searches and seizures. The evidence obtained therefrom was therefore inadmissible at trial and the trial court erred in overruling petitioner's motion to suppress, pursuant to the Fourth and Fourteenth Amendments of the United States Constitution. Trial counsel properly raised this issue and preserved it for appeal. Proper presentation of this meritorious issue to the Texas Court of Criminal Appeals would have caused petitioner's conviction to be reversed and the cause remanded for a new trial. Failure to present this issue, and the jury charge issue, on appeal was therefore plainly prejudicial to petitioner, since it deprived him of his right to a new trial.

Considering that both issues were meritorious, counsel was deficient in not raising them on direct appeal. This deficient performance prejudiced petitioner's chance for a new trial. That is, counsel was ineffective under Strickland v. Washington. The Fifth Circuit below erred in holding otherwise. This Court should grant this writ to correct the error.

V.

THE FIFTH CIRCUIT ERRED IN AFFIRMING THE EXCLUSION OF VENIREPERSON SANTANA IN VIOLATION OF THE PRINCIPLES SET FORTH IN ADAMS V. TEXAS

A fair reading of venireperson Santana's testimony reveals that she never once stated she would dishonestly find facts, or not follow the court's instructions, or disobey her oath. That is, she never said anything that would disqualify her under Wainwright v. Witt, 469 U.S. ____, 105 S. Ct. 844 (1985). Instead, just as the venirepersons discussed in Adams v. Texas, 448 U.S. 38, 50 (1980), Ms. Santana honestly answered that the possibility of the death penalty might "affect . . . what (she) may deem to be a reasonable doubt." Id. As the court held in Adams, such manifestation of special concern for the serious of the ultimate punishment is not grounds for disqualification.

Indeed, disqualification is all the more improper in a case like this one, where the trial judge, in keeping with the time-honored Texas tradition, refused to define for the jury the phrase "proof beyond a reasonable doubt." [R.I--34] Given that each juror was left to personally determine the definition of proof beyond a reasonable doubt, there was no basis for the trial

judge to disqualify a potential juror who honestly stated that her personal definition would be strict.

Improper exclusion of even one venireperson requires reversal of the judgment of conviction. Davis v. Georgia, 429 U.S. 122, 123, (1976). The trial court erred in excluding Santana, in violation of petitioner's right to trial by a fair and impartial jury composed of a fair cross-section of the community, equal protection of the law and due process of law guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. Because the Fifth Circuit's opinion below improperly applied this Court's holding in Adams v. Texas, supra, petitioner's writ should be granted.

VI.

THE LOWER COURT ERRED IN HOLDING THAT ARTICLE 37.071(b)(1) PROPERLY NARROWS THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY

In Jurek v. Texas, 428 U.S. 262 (1976), the petitioner attacked the entire Texas death penalty scheme, on a number of bases. This Court specifically addressed the attack on special issue number two only, noting that, at the time, the Texas Court of Criminal Appeals had not yet had occasion to construe special issue number one. Id. at 272 n.7. Concerning the second special issue, the Court rejected petitioner's contention that the statute was so vague as to be meaningless and hence unconstitutional. Id. at 274-275.

In the ensuing eleven years, the Texas courts have now had ample occasion to construe special issue number one. It is now

appropriate for this Court to take a careful look at this special issue, as it did the second special issue in Jurek, to determine whether it is so vague as to be meaningless. See Godfrey v. Georgia, 446 U.S. 420, 423 (1980)(issue whether Georgia Supreme Court had adopted such a broad and vague construction as to render statute unconstitutional). Petitioner submits that special issue number one is in fact meaningless. Certiorari should be granted to examine Tex. Code Crim. Proc. Ann. art. 37.071(b)(1) and the construction given it by the Texas Court of Criminal Appeals.

Since "intentionally" is the exclusive culpable mental state for capital murder under Tex. Penal Code Ann. sec. 19.03(a)(2), every person convicted of capital murder in the course of robbery or kidnapping has necessarily been determined to have acted intentionally. So it is when the punishment phase of the trial begins, at which time the jury must next decide, among other things, whether the defendant acted deliberately, and with the reasonable expectation that death would result, as provided by special issue number one. If intentionally and deliberately are synonymous, then special issue number one is meaningless. And, if it is meaningless, then the Texas death penalty scheme does not properly narrow the jury's discretion at sentencing. See Zant v. Stephens, 462 U.S. 862, 877 (1983) (to avoid constitutional flaw, "aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence");

Godfrey v. Georgia, 446 U.S. 420, 423 (1980)(statute which failed to narrow the class of persons eligible for the death penalty declared unconstitutional).

Justice Blackmun has grasped the meaningless of this special issue.

> It appears that every person convicted of capital murder in Texas will satisfy the other requirement relevant to Barefoot's sentence, that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result . . ." because a capital murder conviction requires a finding that the defendant intentionally or knowingly cause[d] the death of an individual.

Barefoot v. Estelle, 463 U.S. 880, 917 n.1 (1983) Blackmun, J., dissenting). Although the Texas Court of Criminal Appeals has "repeatedly and resoundingly rejected" this contention, e.g, Marquez v. State, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987), its decisions are not entirely consistent. In King v. State, 631 S.W.2d 486, 502 (Tex. Crim. App. 1982), the court noted the "tremendous amount of confusion and dissension among the bench and bar over the meaning and import of the word "deliberately." In Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Crim. App. 1977) the court recognized the obvious: "a jury having found that defendant intentionally committed a capital murder to be consistent would have to find that the act was deliberately done." And, very recently, in Gardner v. State, ___S.W.2d___, No. 69,235 (Tex. Crim. App. delivered March 25, 1987)(not yet published), it was stated that: "absent applicability of the law

of parties, it will be the extraordinary case in which evidence sufficient to prove an 'intentional' murder for purposes of Sec. 19.03(a)(2) will not also serve in whole or in part to establish that the killing was 'committed' deliberately and with the reasonable expectation that . . . death . . . would result."'

Reading these three cases together, one must visualize a confused jury, rendering inconsistent verdicts in all but extraordinary cases. Surely such was not contemplated by the Supreme Court when it laid down its mandate in Furman v. Georgia, 408 U.S. 238 (1972).

In 1976 the United States Supreme Court upheld the facial validity of the Georgia capital scheme. Gregg v. Georgia, 428 U.S. 153 (1976). Four years later, in Godfrey v. Georgia, 446 U.S. 420 (1980), the Court re-opened the inquiry to determine whether the Georgia Supreme Court had adopted such a broad and vague construction of one particular subsection of the statute as to violate the Constitution. This inquiry convinced the Court that the statute was not properly channelling the sentencer's discretion by clear and objection standards that provide "specific and detailed guidance." Id. at 428. Since, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not, Godfrey's death sentence was vacated.

Petitioner submits that a similar inquiry is appropriate regarding article 37.071(b)(1). It would reveal that in 11 years of reported cases not a single one has been reversed for

insufficient evidence on special issue number one. This analysis gives substance to Justice Blackmun's observation in Barefoot that this special issue is in fact not an issue at all once a defendant has been convicted of capital murder. To state it another way, article 37.071(b)(1), and the construction of it adopted by the Texas Court of Criminal Appeals, is so broad and vague as to be meaningless. Accordingly, the Texas statute is just as unconstitutional as the Georgia statute.

In addition to being meaningless, special issue number one is absurd. Common sense teaches that there is no difference between "intentional" and "deliberate." Attorneys are unable to frame a distinction. E.g., Gardner v. State, _____S.W.2d_____, No. 69,235(Tex. Crim. App. delivered March 25, 1987), slip op. 24 (state's hypothetical "utterly fails to illustrate the intended point"); McCoy v. State, 713 S.W.2d 940, 951 n.1 (Tex. Crim. App. 1986)("we do not endorse the specific examples used"). There is ---son to think that jurors have any easier time with the ction.

To pass constitutional muster, a death penalty scheme must, at a minimum, properly narrow discretion at sentencing to prevent the arbitrary imposition of the ultimate punishment. Furman v. Georgia, 408 U.S. 238 (1972). In Texas it is the function of the special issues provided for in Article 37.071 of the Texas Code of Criminal Procedure to insure that the death penalty is not arbitrarily imposed. See Jurek v. Texas, 428 U.S. 262 (1976). Because special issue number one is meaningless, there is nothing

to prevent the arbitrary imposition of capital punishment in Texas, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

This Court recently granted certiorari in Lowenfield v. Phelps, 817 F.2d 285 (5th Cir.), cert. granted, 55 U.S.L.W. 3852 (June 23, 1987). The issue there is whether the aggravating factor at sentencing duplicates a finding made at the guilt phase. C.f. Collins v. Lockhart, 754 F.2d 258 (8th Cir.), cert. denied, 106 S.Ct. 546 (1985). This is precisely petitioner's contention here. The sentencing criterion of "deliberately" is synonymous with, and therefore duplicative of, the guilty criterion of "intentionally."

In the present case, much as in Lowenfield, once the jury found petitioner guilty of capital murder it had no legal discretion except to sentence him to death. Certiorari is appropriate to allow this Court to examine the Texas statute in the same way it will examine the Louisiana statute in Lowenfield.

VII.

THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ERR IN COMBINING THE DIVERGENT ELEMENTS OF TWO SPEARATE OFFENSES IN A SINGLE PARAGRAPH OF THE JURY CHARGE.

Even the most cursory examination reveals that robbery and kidnapping are composed of different elements in Texas. Compare Tex. Penal Code Ann. § 29.01 with Tex. Penal Code Ann. § 20.01.

In this ground of error petitioner contends that the trial court erred in combining the divergent elements of these two separate offenses in a single paragraph in the jury charge. This

conclusion follows logically from two well established legal conepts.

First, it is axiomatic that the state bears the burden of proving every element of the offense alleged beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684, 685 (1975). In re Winship, 397 U.S. 358, 364 (1970); U.S. Const. Amend. XIV.

Second, it is just as settled in Texas that no person may be convicted of a crime by a jury unless its verdict is unanimous. See TEX. CODE CRIM. PROC. ANN. art. 36.29(a)(Vernons 1981); TEX. CODE CRIM. PROC. ANN. art. 36.31 (Vernons 1981); TEX. CODE CRIM. PROC. ANN. art. 37.04 (Vernons 1981).

Juxtaposition of these two settled legal principles makes it obvious that one accused of a crime has a right not to be convicted unless the jury is unanimously convinced that the state has proven every element alleged beyond a reasonable doubt. Ideally, a properly drafted jury charge will protect this valuable right. See Benson v. State, 661 S.W.2d 708 (Tex. Crim. App. 1983)(sufficiency of evidence is measured by the jury charge). A charge which does not insure that a conviction is founded on the unanimous belief by the jury that the state has proved every element of the offense beyond a reasonable doubt is defective. Examination of the charge given in the present case reveals that it belongs to this letter, defective, category.

Here, paragraph nine of the charge combined the elements of two separate offenses, capital murder in the course of robbery, and capital murder in the course of kidnapping, but then

authorized the jury to return a general verdict as to only one offense--capital murder. The harm to petitioner is easily discernible. For example, it is entirely conceivable that some of the jurors in this case believed that he had committed murder in the course of robbery, as alleged in paragraph two of the indictment, but were not convinced beyond a reasonable doubt of his guilt under paragraph one, alleging murder in the course of kidnapping, while the remaining jurors believed just the opposite, that the state had proven murder/kidnapping beyond a reasonable doubt, but not murder/robbery. Such a combination of jurors could have produced the general verdict rendered here, guilty of capital murder, even though there was no unanimous concurrence on the essential elements of any one particular species of capital murder. Such procedure contravenes the well established constitutional and statutory requirement that a guilty verdict be returned by a jury unanimously convinced that every element alleged had been proven beyond a reasonable doubt.

Petitioner concedes that the state was not required to elect which paragraph would be submitted to the jury. Cf. Franklin v. State, 606 S.W.2d 818 (Tex. Crim. App. 1979). It would have been permissible to submit both paragraphs to the jury in the present case, by means of a properly drafted jury charge. The proper method of submission would insure that any verdict of guilt was based on the unanimous concurrence of the jury as to every element of one particular offense.

Because there is no way to determine whether petitioner was

convicted of a single offense by a unanimous jury, his right to due process and equal protection of the law guaranteed the United States Constitution were violated. C.f. Jackson v. Virginia, 443 U.S. 307 (1979).

The Court of Appeals below rejected this contention, after consulting the record. According to the court, this was not a "realistic objection" because "[o]n the evidence, there was little serious dispute that whoever attacked the victim both robbed and kidnapped her." In light of this "crushing, unanswerable" evidence, the court found no reversible error. Franklin v. Lynaugh, supra, 823 F.2d at 99. Petitioner respectfully submits that this holding conflicts with Connecticut v. Johnson, 460 U.S. 73 (1983). There the state argued that any error in regard to a jury instruction on intent was rendered harmless by the overwhelming evidence of intent. This Court disagreed.

> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant.

Id. at 85-86. [emphasis supplied] The same analysis is applicable here. The evidence here was not overwhelming, but was instead circumstantial. But even assuming it had been overwhelming, that is "irrelevant," since the jury "may have

relied" upon the incorrect, disjunctive jury charge in convicting petitioner. Certiorari should be granted in light of the conflict of the decision below with Connecticut v. Johnson.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted:

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By 
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Attorneys for Petitioner

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD GENE FRANKLIN,

Petitioner

v.

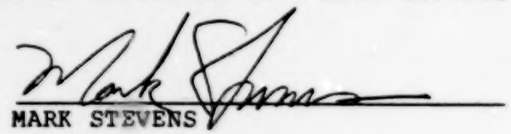
JAMES A. LYNAUGH,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CERTIFICATE OF SERVICE

I Mark Stevens, a member of the bar of this Court, hereby certify that on this 24th day of September, 1987, one copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first class, postage prepaid to Robert S. Walt, Assistant General for the Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for the respondent herein. I further certify that all parties required to be served have been served.


MARK STEVENS

sion in the government's favor on the merits, it is evident that this exception would not apply in the instant case. Moreover, equitable jurisdiction does not exist here because it is well established that a taxpayer's right to sue for a refund under 26 U.S.C. § 7422 provides an adequate remedy at law. *See Zernial v. United States*, 714 F.2d 431, 434 (5th Cir.1983). We therefore conclude that 5 U.S.C. section 702 is unavailable to the plaintiffs, and the United States has not waived its sovereign immunity against the instant suit.

[5] As the government notes, the Supreme Court has recognized two exceptions to the doctrine that sovereign immunity, absent specific statutory consent to suit, bars suit against the sovereign. Sovereign immunity does not bar suit (1) where the federal officers in question act beyond their statutory powers, or (2) where the statutory powers exercised, or the manner in which they are exercised, by the federal officers are unconstitutional. *Dugan v. Rank*, 372 U.S. 609, 621–22, 83 S.Ct. 999, 1006–07, 10 L.Ed.2d 15 (1963). Plaintiffs have not challenged the constitutionality of section 6166 of the Internal Revenue Code or its application in their case. Nor does the complaint allege, or the opinion of the district court find, any action by the IRS that could be characterized as *ultra vires*. An exception to the bar of sovereign immunity cannot be established on the facts before us.

III.

Because the doctrine of sovereign immunity bars the plaintiffs' suit, the judgment of the district court is REVERSED as beyond its jurisdiction and this cause is REMANDED for dismissal without prejudice of plaintiffs' claims.

Donald Gene FRANKLIN, Petitioner-Appellant,

v.

James A. LYNAUGH, Interim Director, Texas Department of Corrections, Respondent-Appellee.

Nos. 86-2538, 86-2883.

United States Court of Appeals, Fifth Circuit.

July 30, 1987.

State prisoner who had been convicted of murder petitioned for habeas corpus. Relief was denied by the United States District Court for the Western District of Texas, at San Antonio, H.F. Garcia, J., and petitioner appealed. The Court of Appeals held that: (1) relief was not warranted by improper reference to petitioner's postarrest silence after *Miranda* warning; (2) relief was not warranted on statistics claim that murder statute was applied discriminatory way against blacks who murdered whites; and (3) relief was not warranted on basis of charge which could have permitted jury to convict defendant of capital murder for killing committed in the course of felony when some jurors may have believed that felony was robbery while others thought it was kidnapping.

Stay of execution vacated and judgment affirmed.

See also, 106 S.Ct. 1238.

1. Habeas Corpus ⇐45.2(7)

Improper reference to petitioner's postarrest silence after he received his *Miranda* warnings did not warrant habeas relief where sustained objection and instruction to disregard followed the improper question.

2. Habeas Corpus ⇐45.2(3)

Statistics-based claim that Texas murder statute was applied in a discriminatory way against blacks who murdered whites did not warrant habeas relief.

3. Habeas Corpus ⇐45.2(7)

Charge which could have permitted jury to convict petitioner of capital murder for killing committed in the course of a felony, when some of the jurors may have believed that the felony was robbery while others thought it was kidnapping, did not warrant habeas relief where there was little serious dispute that whoever attacked the victim both robbed and kidnapped her and the major defense was mistaken identity.

Mark Steven, Allen Cazier, George Scharmen, San Antonio, Tex., for petitioner-appellant.

William C. Zapalac, Asst. Atty. Gen., Jim Mattox, Atty. Gen., Austin, Tex., for respondent-appellee.

Appeals from the United States District Court for the Western District of Texas.

Before GEE, RANDALL, and DAVIS, Circuit Judges.

PER CURIAM:

There is small occasion for us to rehearse the sickening facts of this murder, one in which an innocent victim who stepped into the wrong place at the wrong time was stabbed, raped and left to bleed to death for five days in the July sun of Texas. These are set forth at length in the various opinions on direct appeal, e.g., 606 S.W.2d 818 (Tex.Crim.App.1979). Nor need much be said on the law, it having developed and set against petitioner's contentions over the course of the twelve years since his crime. We affirm the trial court's judgment denying habeas relief on the basis of that court's opinions, adding a few observations chiefly based on events occurring since that court ruled.

[1] Of petitioner's points, the most nearly meritorious is that complaining of an improper reference to petitioner's postarrest silence after he had received *Miranda* warnings. Since the handing down of *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), comments by the prosecutor on the post-arrest silence of a defendant after the administration of *Miranda* warnings have been taboo. The Supreme Court has now held, however, that such a question as the prosecutor asked in this case does not require a grant of habeas relief where no *use* of the fact of petitioner's silence is permitted by the court. *Greer v. Miller*, — U.S. —, 107 S.Ct. 3102, 95 L.Ed.2d —, 55 U.S.L.W. 5126 (1987). Here there was none; a sustained objection and an instruction to disregard followed hard on the improper question. It was never heard of again. *Greer* is on all fours; it controls.

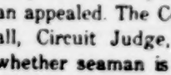
[2] The next most troubling was a statistics-based claim that the Texas murder statute is applied in a discriminatory way against blacks who murder whites. Petitioner's claims in this respect have been resolved against him by the Court's opinion in *McCleskey v. Kemp*, — U.S. —, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

[3] Finally, we were concerned by petitioner's contention that the wording of the trial court's charge was such as to have permitted the jury to have convicted petitioner of capital murder for a killing committed in the course of a felony, when some jurors may have believed that the felony was robbery, while others thought it kidnapping.[1] While, on the words of the court's charge standing alone, this may seem a realistic objection, when the record is consulted, it is not. On the evidence, there was little serious dispute that whoever attacked the victim both robbed and kidnapped her. Petitioner's defense disputed these matters only pro forma, his major claim was that he was not the perpetrator of the crime, that his indictment was the result of mistaken identity. The evidence supporting the commission of both felonies was crushing, unanswerable; the only question was, who did them? In these circumstances, the claim that some jurors

1. The portion of the charge in question authorized conviction on a finding of murder "... in the course of committing and attempting to commit the offense of robbery or kidnapping (emphasis supplied).

may have thought Franklin only a kidnapper while others thought him only a robber lacks any substance whatever, despite its abstract plausibility. The jury faced only one real question: whoever did this thing did both robbery and kidnapping, but was it Franklin?

The jury found that it was. For whatever it adds, we agree. The stay of execution earlier granted is VACATED, and judgment is AFFIRMED.



James BREESE, Jr.,
Plaintiff-Appellant Cross-Appellee,

v.

AWI, INC., Defendant-Appellee Cross-Appellant.

No. 86-3607
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

July 30, 1987.

Disabled seaman brought action seeking damages under Jones Act and general maritime law, based upon shipowner's purported bad-faith failure to pay maintenance and cure following heart attack. The United States District Court for the Eastern District of Louisiana, Fred J. Cassibry, J., determined that seaman was not entitled to recover attorney fees and punitive damages. Seaman appealed. The Court of Appeals, Randall, Circuit Judge, held that question of whether seaman is entitled to maintenance turns on whether individual seaman has reached maximum cure, which is medical question, not legal one, so that reliance on advice of counsel, as opposed to advice of physician, is insufficient to constitute reasonable investigation of seaman's right to maintenance and cure of situation where a counsel is not advised as to seaman's medical condition.

Affirmed in part; and reversed in part and remanded.

1. Federal Courts ⇐868

District court's factual findings underlying its conclusion of whether failure to pay disabled seamen maintenance and cure was arbitrary and capricious are, like other factual findings, reviewed under clearly erroneous standard. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

2. Federal Courts ⇐813, 830, 868

In determining whether district court erred in concluding that disabled seaman was not entitled to award of punitive damages and attorney fees based upon ship owner's purported bad-faith failure to pay maintenance and cure following heart attack, Court of Appeals first inquired as to whether district court's findings that shipowner's conduct investigating claim was not callous or arbitrary and capricious were clearly erroneous, and second inquired as to whether district court's failure to award punitive damages and attorney fees amounted to abuse of discretion. Fed. Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

3. Seamen ⇐11(9)

In determining whether ship owner has arbitrarily and capriciously denied maintenance and cure to injured seaman so as to make shipowner liable for punitive damages and attorney fees, each case is to be evaluated on its own facts.

4. Seamen ⇐11(9)

Shipowner's investigation of disabled seaman's claim, which investigation did not include inquiry of any physician, much less seaman's treating physicians, or review of any of seaman's medical records, was impermissibly lax under any reasonable standard, rendering shipowner's decision not to pay maintenance and cure beyond seaman's discharge from hospital arbitrary and capricious, for purpose of determining shipowner's liability for punitive damages and attorney fees.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

DONALD GENE FRANKLIN,

Petitioner

VS. SA-86-CA-608

O.L. McCOTTER, Director
Texas Department of Corrections,

Respondent

MEMORANDUM OPINION

On this day came on to be considered petitioner's application for writ of habeas corpus, filed pursuant to 28 U.S.C. Section 2254. The application was referred to United States Magistrate Jamie C. Boyd to conduct an evidentiary hearing, to review state court records and to submit proposed findings of fact and conclusions of law and a recommendation for disposition to this Court. Magistrate Boyd concluded that petitioner was not entitled to relief, and that the application should be denied. Petitioner has timely objected to the report. This Court has conducted a de novo review by reading and considering the pleadings, the transcript of the evidentiary hearing, the state court records, and the applicable law. Having done so, it is the opinion of this Court that the recommendation should be adopted. Petitioner's claims A, E, F, G, H, I, J, and K were adequately addressed by Magistrate Boyd, lack merit, and need not be discussed again.

In claim C, petitioner contends that the state trial court erred in failing to include in its jury charge,

instructions regarding the jury's consideration of mitigating evidence. In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that a death penalty statute which does not permit the sentencer to consider mitigating factors, violates the Eighth and Fourteenth Amendments. The current Texas death penalty law, Article 37.071 of the Texas Code of Criminal Procedure, was upheld in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). The Supreme Court, after noting that the Texas statute does not explicitly speak of mitigating circumstances, found that it did permit the jury to consider whatever evidence of mitigating circumstances the defense wishes to introduce. Id. at 272-73, 99 S.Ct. at 2956-57. Although the decision in Jurek preceded that in Lockett, it is clear that Article 37.071 complies with the requirement of Lockett. The Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances. Zant v. Stephens, 462 U.S. 862, 890, 103 S.Ct. 2733, 2750, 77 L.Ed.2d 235 (1983). The failure to so instruct the jury in this case was not error. See, Esquivel v. McCotter, 777 F.2d 956 (5th Cir. 1985). Since there was no error, petitioner's appellate counsel could not be ineffective for failing to raise that issue on appeal.

Petitioner also challenges the state trial court's order overruling his motion to suppress evidence. He sought to suppress various items of incriminating evidence seized from his home and car after he signed a consent-to-search form. The State

contends and the Magistrate found that consideration of this issue by this Court is foreclosed by Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). In Stone, the Supreme Court held that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. Id. at 494, 96 S.Ct. at 3052. The Fifth Circuit has interpreted "full and fair" consideration to include at least one evidentiary hearing in a trial court, and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute. O'Berry v. Wainwright, 546 F.2d 1204, 1213 (5th Cir. 1977). If a State provides the processes whereby a defendant can obtain full and fair litigation of a Fourth Amendment claim, Stone v. Powell bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes. Caver v. State of Alabama, 577 F.2d 1188, 1192 (5th Cir. 1978). See, Christian v. McCaskle, 731 F.2d 1196, 1199 n.1 (5th Cir. 1984). In the absence of allegations that the processes are routinely or systematically applied in such a way as to prevent the actual litigation of Fourth Amendment claims, federal review is precluded. Williams v. Brown, 609 F.2d 216, 220 (5th Cir. 1980). Petitioner has made no such contentions.

Twice the motion to suppress was heard and overruled. Prior to the first trial and then prior to the third trial,

evidence was presented on the Fourth Amendment claim. Petitioner had every opportunity to cross-examine the State's witnesses, to challenge the State's exhibits, to present his evidence, and to argue his position. At the second hearing, the trial judge made several relevant inquiries of the witnesses and stated that he had read the cases pertinent to the suppression issue. In neither his first appeal (Franklin v. State, 606 S.W.2d 818 (Tex.Crim.App. 1978)) nor his third appeal (Franklin v. State, 693 S.W.2d 420 (Tex.Crim.App. 1985)) did petitioner challenge the trial court's rulings, despite the opportunity to do so. Not until April 3, 1986, in his state application for writ of habeas corpus, did he present the Fourth Amendment claim to the Texas Court of Criminal Appeals, which denied it. The application had previously been denied by the trial court which held that the issue was not cognizable in a post-conviction habeas corpus proceeding. Petitioner asserts that ineffective assistance of his appellate counsel, an issue to be discussed below, in failing to raise the Fourth Amendment claim on direct appeal, precluded him from having an opportunity for full and fair litigation. This Court believes that, while this failure can be reviewed under the Sixth Amendment, it does not affect the application of Stone v. Powell. Having read the transcripts of the state court suppression hearings, this Court is firmly convinced that petitioner's motion hinged exclusively on disputed facts. Petitioner received full and fair litigation of his suppression claim in state trial court and had the availability of meaningful

appellate review; federal habeas corpus cannot lie. See, O'Berry v. Wainwright, 546 F.2d at 1213.

In the final point to be addressed, petitioner contends he was denied the effective assistance of counsel on appeal because of counsel's failure to raise the Fourth Amendment issue. Until recently, whether Stone v. Powell precluded a Sixth Amendment claim such as this was undecided. Lockhart v. McCotter, 782 F.2d 1275, 1279 n.7 (5th Cir. 1986). In Kimmelman v. Morrison, 54 U.S.L.W. 4789, decided June 26, 1986, the United States Supreme Court held that federal habeas relief is available in such situations. Examination of the claim is, therefore, appropriate, since petitioner has a right to the effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. ____, ____, 105 S.Ct. 830, 836-37, 83 L.Ed.2d 821 (1985).

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-pronged test for determining the effectiveness of counsel's performance. The defendant must show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense. 104 S.Ct. at 2064. In determining whether counsel's performance was deficient, the relevant inquiry is whether counsel's representation fell below an objective standard of reasonableness according to prevailing professional standards. Id. at 2065. The reviewing court must give great deference to counsel's assistance, strongly presuming that counsel has exercised reasonable professional judgment. Lockhart v. McCotter, 782 F.2d at 1279.

At the evidentiary hearing before Magistrate Boyd, testimony was elicited that petitioner's appellate counsel was deficient in failing to appeal the suppression issue. Allen Cazier, trial counsel for petitioner at the third trial, testified that whether petitioner voluntarily consented to the search of his house and car was the "most significant issue" in terms of his defense. Cazier discussed the search issue with David Chapman, petitioner's appellate counsel, and encouraged him to raise it. Gerald Goldstein, a highly competent and respected criminal defense lawyer, testified that in a capital murder case, appellate counsel should raise arguable claims, which Goldstein believed, from reading petitioner's application for writ of habeas corpus, encompassed the Fourth Amendment claim here. David Weiner, an experienced criminal appeals lawyer, echoed this belief.

In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), the Supreme Court held that a defendant has no constitutional right to compel appointed counsel to press non-frivolous points on appeal. The appellate advocate must be allowed to examine the record with a view to selecting the most promising issues for review. Id. at 752, 103 S.Ct. at 3313.

> "For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy that underlies Anders [v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)].
> Id. at 754, 103 S.Ct. at 3314.

This Court perceives no distinction between "arguable" and "colorable" claims. The belief that appellate counsel should raise all arguable claims does not comport with Jones. See, Evitts v. Lucey, 105 S.Ct. at 835.

The testimony of Chapman establishes his reasons for choosing not to raise the suppression issue. He spent approximately ninety hours on the appeal. He researched and investigated the search and seizure issue, and took extensive notes from the record. Chapman believed that, for petitioner to prevail on appeal, the Texas Court of Criminal Appeals would have to find that the testimony of the police officers was false. He did not believe the appellate court would second-guess the credibility choices of the trial courts. As mentioned above, petitioner's motion presented credibility choices almost exclusively. As noted by Goldstein and Weiner, such situations make reversal more difficult because of the stringent standard for review. Chapman believed that the search question was not meritorious, and had virtually no chance of success. The testimony of Goldstein and Weiner to the contrary, which was based solely upon a reading of petitioner's application for writ of habeas corpus, and not upon a review of the state court briefs or transcripts, is unpersuasive. Chapman chose not to present the issue because it would diminish his credibility and detract from the grounds of error he believed did have merit. See, Jones v. Barnes, at 753, 103 S.Ct. at 3313. Chapman's research and investigation and his decision to raise only those points he believed had some plausible merit, represents the kind of

strategy that able counsel pursue and appellate courts appreciate. See, Wicken v. McCotter, 783 F.2d 487, 497 (5th Cir. 1986). His representation of petitioner on appeal was not deficient.

While this finding is sufficient to justify denial of the ineffective assistance claim, the Court feels it appropriate, because this is a death penalty case, to also discuss its belief that petitioner suffered no prejudice from the failure to appeal the Fourth Amendment claim. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 104 S.Ct. at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. In this case, petitioner would have to establish a meritorious Fourth Amendment claim resulting in suppression of the incriminating evidence.

In his federal habeas corpus application, petitioner contends that he did not voluntarily consent to the search of his home and car. The application states that he was told by a police officer that if he did not consent, a search warrant would be obtained. Petitioner also claims he was under arrest at the time the consent was given, and that many police officers had their weapons drawn. He further contends that the arrest was illegal and tainted the subsequent consent. The allegation of a warrant threat is baseless, since petitioner, at the first suppression hearing, denied that the officer told him he would obtain a warrant if petitioner did not consent. (S.F.-I, p. 506). Such a statement could not, therefore, have been a factor in his

decision to consent. As for the illegal arrest issue, it was never presented to the trial courts. While the motion to suppress was based on the voluntariness vel non of the consent, neither the brief nor the evidence was directed to the legality of the arrest and its effect on the consent. Because of this, there is little proof of the existence or lack of probable cause to arrest. The trial courts were never given the opportunity to rule on this precise sue, and it cannot, therefore, be considered now. See, United States v. Hicks, 524 F.2d 1001, 1004 (5th Cir. 1975), cert. denied, 424 U.S. 946 (1976). Writt v. State, 541 S.W.2d 424, 426 (Tex.Crim.App. 1976). In any event, the evidence on petitioner's arrest status was conflicting. Whether petitioner was under arrest and/or warned of his constitutional rights prior to consenting were matters bearing on consent which the trial courts could consider. Some testimony indicated that the consent form was signed before he was arrested (S.F.-I, pgs. 459, 474, 476), while other evidence suggests he was arrested prior to consenting. (S.F.-I, p. 372; S.F.-III, p. 153). The trial courts were entitled to believe either scenario.

In determining whether consent was knowingly and voluntarily given, courts must analyze the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 226, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973). United States v. Davis, 749 F.2d 292, 294 (5th Cir. 1985). At the first suppression hearing in December, 1975, petitioner was the only witness for the defense who was present at the scene. He testified he was jerked out of his door and pushed against a wall. (S.F.-I, p.

476). He also stated he was presented with a search warrant for his house which he was told to sign. (S.F.-I, p. 475). Because of the guns which were drawn and pointed at him, he feared for his safety and signed. (S.F.-I, p. 477). At the second suppression hearing in January, 1982, petitioner's stepfather, mother and common law wife testified that the officer's weapons were drawn and that petitioner was physically mistreated and told to sign the consent form. (S.F.-III, pgs. 90-92, 112-113, 125).

This Court believes, as did the state trial courts, that the defense version of the events lack credibility. Petitioner's previous rape conviction and his obvious keen personal interest in the outcome of the suppression hearing detract from his credibility. Not until the second hearing did petitioner's other eyewitnesses testify. Statements given by his stepfather and wife the day after the arrest do not mention that he was pulled out of the door into the yard full of police officers with drawn guns. (S.F.-III, pgs. 101, 129). The stepfather's statement indicates petitioner consented of his own choosing. (S.F.-III, p. 100). Several officers testified petitioner was not jerked or pulled from his house, and that guns were not drawn. (S.F.-III, pgs. 153-154, 183, 213, 215, 222-223, 242, 261, 266). He was asked to sign and told he did not have to sign. (S.F.-I, p. 395; S.F.-III, pgs. 153, 224). He was not forced, threatened or coerced into signing. (S.F.-III, pgs. 155, 182, 266). Petitioner never indicated he did not want to consent. (S.F.-I, pgs. 377, 416, 428-429). He read and understood the consent form, signed it and told the officers he had nothing to

hide. (S.F.-I, pgs. 334, 373-374; S.F.-III, pgs. 118, 224). The motion to suppress was properly overruled, precluding the necessary showing that appellate counsel's failure to appeal the ruling prejudiced petitioner. His ineffective assistance of counsel claim is without merit and his application for writ of habeas corpus shall be denied.

SIGNED this 9th day of July, 1986.

H.F. Garcia

H.F. GARCIA
UNITED STATES DISTRICT JUDGE

87-5546

No. ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH,

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, DONALD GENE FRANKLIN, who is now confined on death row at the Texas Department of Corrections, known as Ellis Unit, asks leave to file the attached Petition for a Writ of Certiorari to the Fifth Circuit Court of Appeals without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The petitioner's affidavit in support of this motion is attached.

Respectfully submitted:

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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Mark Stevens, a member of the bar of this Court, hereby certify that on this 24th day of September, 1987, one copy of the Motion for Leave to Proceed in Forma Pauperis in the above-entitled case was mailed, first class postage prepaid, to Robert S. Walt, Assistant Attorney General for the state of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for the respondent herein. I further certify that all parties required to be served have been served.

MARK STEVENS

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

DONALD GENE FRANKLIN, Petitioner	)	
VS.	)	NO. SA-86-CA-608
O.L. MCCOTTER, DIRECTOR TEXAS DEPARTMENT OF CORRECTIONS, Respondent	)	

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, DONALD GENE FRANKLIN, being first duly sworn, depose and say that I am the petitioner in the above-styled and numbered cause; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, that I believe I am entitled to redress; and that the issues which I desire to present are the following:

I.

A.

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S MOTION TO SUPPRESS PHYSICAL EVIDENCE WHICH WAS SEIZED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

B.

THE TRIAL COURT ERRED IN DENYING PETITIONER'S SPECIAL REQUESTED JURY INSTRUCTIONS ONE THROUGH FIVE REGARDING MITIGATING EVIDENCE AT THE PUNISHMENT PHASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

C.

COURT APPOINTED COUNSEL ON APPEAL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO RAISE MERITORIOUS ISSUES WHICH PREJUDICED PETITIONER'S RIGHT TO REVERSAL OF HIS CONVICTION, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

D.

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S MOTION FOR MISTRIAL WHERE THE STATE COMMENTED ON HIS POST-ARREST SILENCE, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

E.

THE TRIAL COURT ERRED IN GRANTING THE STATE'S CHALLENGE FOR CAUSE OF VENIRE PERSON SANTANA IN VIOLATION OF PETITIONER'S RIGHT TO TRIAL BY A FAIR AND IMPARTIAL JURY COMPOSED OF A FAIR CROSS-SECTION OF THE COMMUNITY, EQUAL PROTECTION OF THE LAW AND DUE PROCESS OF LAW GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

F.

THE TRIAL COURT FUNDAMENTALLY ERRED IN COMBINING THE DIVERGENT ELEMENTS OF TWO SEPARATE OFFENSES IN A SINGLE APPLICATION PARAGRAPH OF THE JURY CHARGE BECAUSE SUCH SUBMISSION PERMITTED THE JURY TO FIND PETITIONER GUILTY WITHOUT UNANIMOUSLY BELIEVING HIM GUILTY BEYOND A REASONABLE DOUBT IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

G.

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S SPECIAL PLEA OF DOUBLE JEOPARDY BECAUSE PETITIONER WAS CONVICTED OF MURDER IN HARRIS COUNTY, AND WHERE RETRIAL FOR CAPITAL MURDER VIOLATED THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

H.

TEX. CODE CRIM. PROC. ANN. ART. 37.071 (b)(1) IS CONSTITUTIONALLY FLAWED AND DENIES PETITIONER HIS RIGHT TO A FAIR AND IMPARTIAL JURY, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW, AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. BECAUSE SAID STATUTE FAILS TO PROPERLY NARROW THE CLASS OF PERSONS ELIGIBLE FOR THE DEATH PENALTY.

I.

PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. BECAUSE THE TRIAL COURT FAILED SUA SPONTE TO DEFINE "DELIBERATELY" AS THAT WORD IS USED IN TEX. CODE CRIM. PROC. ANN. ART. 37.071(b)(1).

J.

PETITIONER WAS DENIED A FAIR AND IMPARTIAL TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION OF LAW, DUE PROCESS OF LAW AND HIS RIGHT TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. BECAUSE THE TRIAL COURT FAILED SUA SPONTE TO DEFINE THE PHRASE "PROOF BEYOND A REASONABLE DOUBT."

II.

Because of my indigency I am unable to pay the costs or give security in this case. My attorneys were appointed at my trial and at the appeal therefrom. My present attorneys are functioning as volunteer attorneys, without payment, to my indigency.

III.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received?

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rental payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account?
No

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

a. If the answer is yes, describe the property and state its approximate value.